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# The DSA Draft: Ambitious Rules, Weak Enforcement Mechanisms

Why a European Platform  
Oversight Agency Is Necessary



Think Tank at the Intersection of Technology and Society



## **Executive Summary**

The decades of platforms playing only by their own rules and outdated laws are coming to an end in the European Union (EU). The basic framework for European platform regulation, which was enacted in 2000, has long needed an update and expansion in light of privacy breaches, disinformation campaigns and algorithmic discrimination related to online platforms. To tackle this task, the European Commission presented its Digital Services Act (DSA) as an important legislative proposal that could help rein in big tech companies. The draft DSA contains new due diligence rules for platforms that have not been part of legislative efforts in many other places worldwide. For instance, platforms need to conduct risk assessments and explain their algorithmic recommender systems. Many of these rules need clarifications, but they are a step in the right direction.

As progressive as the new rules are compared to other legislative initiatives around the world, they risk falling victim to an inconsistent and complicated enforcement regime. Enforcing the DSA is the responsibility of several national regulators in the member states (such as media regulators, consumer protection agencies, competition authorities and telecommunications regulators) and the Commission. Member states would have to designate one of their regulators as the “Digital Services Coordinator” (DSC). Each DSC is meant to be the single national point of contact for DSA matters for the Commission and for platforms. It can enforce DSA rules and sanction platforms for violations. However, when very large online platforms (i.e., those with 45 million monthly users) are concerned, national regulators are supposed to coordinate with the Commission in a long, multi-step process. In addition, there is a new European Board for Digital Services which advises the Commission. It is made up of national regulators, but chaired by the Commission, and can only issue opinions.

This enforcement structure relies strongly on existing regulators to expand their staffs and take on new tasks. In some member states, regulators might be capable and willing to do this, and might have already taken up some of these tasks. In other countries, regulators might be willing, but need more time to secure funding and build up necessary expertise, or others may not be willing at all. As a result, EU-wide rules from the DSA could be unevenly enforced. This would considerably weaken the DSA’s impact and repeat some of the issues plaguing another landmark piece of EU legislation, the General Data Protection Regulation (GDPR). European data protection rules grant citizens important rights and impose duties on companies processing personal data, including big online platforms. Yet, the GDPR’s potential positive effects are seriously hampered by different levels of enforcement across EU member states.



By involving the Commission and not leaving everything to national regulators, the DSA draft seems intent on learning from issues with GDPR enforcement. This structure, however, creates its own problems. The Commission is an executive body under political leadership and not an independent expert regulator, which is necessary to oversee platforms. The well-meaning attempt to prevent another GDPR scenario could backfire and weaken enforcement of the DSA, if national regulators do not step up and if there are turf wars between national regulators, and between national regulators and the Commission. In the end, the beneficiaries would be tech platforms whose corporate decisions would still set the tone for platform design and whose business practices would still not be overseen in a consistent manner by an expert regulator.

To solve this problem, policymakers in the member states and at the EU level should overhaul their current enforcement plans and build a dedicated European-level agency charged with enforcing the DSA's new due diligence rules. Transparency reporting, explanations for recommender systems and audits are matters of EU-wide concern and apply to tech companies with an EU-wide reach, so they should be overseen by an EU body: a European Digital Services Coordinator. This body should focus specifically on platforms offering citizens digital spaces where they exchange views with one another, consume and share news, and receive and send political messages. This would include search engines, social media sites, video platforms and messenger services with public, social networking functions. Such platforms are important enough and different enough from other platforms and other industries that they require their own specific oversight regime. Their design and business model also carry specific individual and societal risks, such as amplifying disinformation, algorithm bias and privacy concerns, that necessitate their own oversight. The DSA provides the rulebook for addressing these risks, but not the right mechanisms to enforce the rulebook. Instead of relying on at least 27 different national regulators, the Commission and a new European advisory board, the EU should build a single European Digital Services Coordinator to deal with social networks and search engines.

A strong, well-staffed, independent European Digital Services Coordinator could focus squarely on social media sites and search engines, dealing with issues specific to these types of platforms and their frequently changing design and technology. While knowledge of this could also be built up among existing regulators, a dedicated agency has the advantage of not being distracted by other regulatory tasks. New processes of knowledge-gathering and knowledge-sharing with external experts from a diverse set of fields could be implemented that might be harder to establish at 27 separate national regulators and the Commission. Crucially, a European DSC would allow the EU to speak with one voice when addressing big tech companies and it would prevent companies from settling in the country with a regulator most favorable to them.



The DSA draft contains important and ambitious rules for platforms. Policymakers in the EU should now work towards making the enforcement mechanism just as ambitious. But building a new agency such as a European DSC will face serious hurdles, including legal questions, and will not be completed overnight. Path dependencies in member states and at the EU level make any move towards a new agency difficult, as existing regulators and governments will likely cling to their power. This is visible, for example, in Germany. The country has taken a lead on platform regulation and now, state and federal actors are keen on keeping their own rules. These national efforts, however, are simultaneously innovative and short-sighted: Progressive rules for platforms are enforced by regulators having to multitask in various regulatory fields that are unrelated to platform oversight. The DSA risks reproducing this structure if it were enforced by national regulators and the Commission, which is a likely scenario. Even if this system might work, the DSA should be seen as an opportunity to evaluate how much longer legacy regulators can be retrofitted to address platform issues and enforce new rules.

Future discussions about the DSA and its enforcement should include consideration of a dedicated, specialized EU agency that can focus solely on ensuring transparency and accountability for corporate decisions that shape the architecture of digital information spaces for millions of people in the EU.



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## 1. Introduction

As one of the European Union's (EU) major initiatives for regulating tech companies, the draft Digital Services Act (DSA)<sup>1</sup> proposes new rules for social media sites, video apps and other platforms at the European level. Due diligence rules include mandatory transparency reporting, audits and online ad databases. Mandates like these have seldom been part of any EU legislation before and only a few countries, among them Germany, have even tried to regulate platforms in this way. The EU's approach now recognizes that online platforms are a new type of industry requiring its own rulebook. Just like lawmakers established regulation for what were then new technologies, such as trains and telecommunications, the DSA now develops an accountability and compliance framework for online platforms.

However, the DSA draft does not recognize that a new rulebook also requires new oversight structures. Tech companies are different and unique enough compared to other companies and industries that it is simply not sufficient to re-use existing regulatory structures. But this is exactly what the draft does: The proposed oversight structure relies on the European Commission and existing member state agencies to enforce the DSA rules, with each member state designating one national agency to be the "Digital Services Coordinator" (DSC). This is a shortcoming of the draft because the Commission is not an expert regulator, and member states might lack agencies that are well-equipped to enforce DSA rules. Furthermore, the proposal remains ambiguous in how the enforcement responsibilities are divided between member states and the Commission. It introduces a rather complex coordination system between national regulators, the DSCs, the Commission and a newly created EU advisory body, the European Board for Digital Services.

In future iterations of the DSA, lawmakers need to rethink the enforcement structure. One option is to reduce the role of the Commission, scrap the Board and DSC designations, and leave enforcement solely to member states. A coordination mechanism between national regulators could be envisioned, but otherwise, such an enforcement regime would only draw on existing expertise of national regulators. This system is unlikely to ensure a coherent approach to implementing and enforcing the DSA. The EU's General Data Protection Regulation (GDPR) can be seen as a cautionary tale for relying too much on national regulators. The GDPR has not been evenly enforced across the EU, in part due to a lack of resources in or willingness by member states. Moreover, such a member-state-first approach would fail to recog-

<sup>1</sup> European Commission, "COM(2020)825/1 – Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and Amending Directive 2000/31/EC" (2020), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A825%3AFIN>; In addition to the DSA, the EU has also proposed a Digital Governance Act, a Digital Markets Act and a regulation on artificial intelligence, along with a non-legislative European Action Plan for Democracy. These proposals should be considered together as a package for EU platform regulation, but the focus of this paper is on the DSA.

nize that platform business models are the same across the EU and that the risks associated with this business model are not national in scope. Take the case of a piece of misleading information regarding a public health crisis: The risk of algorithmic amplification of this information and a platform's failure to address this risk are matters of corporate compliance with due diligence rules that apply to all member states, no matter what country any individual piece of misleading content might have emerged in.

A better option to ensure a consistent application of the DSA is to build a single, EU-level oversight agency with specific tasks that does not duplicate national regulators. Instead of asking what existing regulators might be capable of enforcing the DSA and willing to do so, lawmakers should ask what type of oversight regime would be necessary to ensure strong, consistent enforcement of the DSA. Instead of relying on national regulators and the Commission, which have many other, unrelated tasks to fulfill, and instituting ambiguous coordination mechanisms, the DSA should establish a European Digital Services Coordinator.

The idea of a platform agency is not new. On the European level, there have been suggestions for a European Platform Observatory<sup>2</sup>, an Agency for Trust in the Digital Platform Economy<sup>3</sup> and already for a new DSA regulator<sup>4</sup>. In France, a transparency-focused oversight regime<sup>5</sup> was suggested and a new regulator might be built<sup>6</sup>, while in Germany, there are ideas for a Digital Agency (“Digitalagentur”) in a white book for the German Ministry of Economics<sup>7</sup> and for an “internet general manager’s office” (“Internetintendanz”)<sup>8</sup>. In the US, a Digital Platform Agency<sup>9</sup>, a Digital Plat-

2 Bernhard Rieder and Jeanette Hofmann, “Towards Platform Observability,” *Internet Policy Review* 9, no. 4 (December 18, 2020), <https://policyreview.info/articles/analysis/towards-platform-observability>.

3 Marc Tessier, Judith Herzog, and Lofred Madzou, “Regulation at the Age of Online Platform-Based Economy: Accountability, User Empowerment and Responsiveness,” in *Platform Regulations: How Platforms Are Regulated and How They Regulate Us* (FGV Direito Rio, 2017), <http://bibliotecadigital.fgv.br/dspace/handle/10438/19402>.

4 Eliška Pírková, “Access Now’s Position on the Digital Services Act Package” (Brussels: Access Now, September 2020), <https://www.accessnow.org/cms/assets/uploads/2020/10/Access-Nows-Position-on-the-Digital-Services-Act-Package.pdf>.

5 Sacha Desmaris, Pierre Dubreuil, and Benoît Loutrel, “Creating a French Framework to Make Social Media Platforms More Accountable: Acting in France with a European Vision” (Paris: French Secretary of State for Digital Affairs, May 2019), [https://minefi.hosting.augure.com/Augure\\_Minefi/r/ContenuEnLigne/Download?id=AE5B7ED5-2385-4749-9CE8-E4E1B36873E4&filename=Mission%20Re%CC%81gulation%20des%20re%CC%81seaux%20sociaux%20-ENG.pdf](https://minefi.hosting.augure.com/Augure_Minefi/r/ContenuEnLigne/Download?id=AE5B7ED5-2385-4749-9CE8-E4E1B36873E4&filename=Mission%20Re%CC%81gulation%20des%20re%CC%81seaux%20sociaux%20-ENG.pdf).

6 Laura Kayali, “France Sets Path for New Super Tech Regulator,” *POLITICO*, April 8, 2021, <https://pro.politico.eu/news/france-tech-regulator-conseil-superieur-audiovisuel-hadopi-online-platforms>.

7 Bundesministerium für Wirtschaft und Energie, “Weißbuch Digitale Plattformen: Digitale Ordnungspolitik für Wachstum, Innovation, Wettbewerb und Teilhabe” (Berlin: Bundesministerium für Wirtschaft und Energie, March 20, 2017), [https://www.bmwi.de/Redaktion/DE/Publikationen/Digitale-Welt/weissbuch-digitale-plattformen.pdf?\\_\\_blob=publicationFile&v=24](https://www.bmwi.de/Redaktion/DE/Publikationen/Digitale-Welt/weissbuch-digitale-plattformen.pdf?__blob=publicationFile&v=24).

8 Christoph Bieber, Leonhard Dobusch, and Jörg Müller-Lietzkow, “Die Internetintendanz,” *Medienkorrespondenz*, April 28, 2019, <https://www.medienkorrespondenz.de/leitartikel/artikel/die-internetintendanz.html>.

9 Tom Wheeler, Phil Verveer, and Gene Kimmelman, “New Digital Realities, New Oversight Solutions in the U.S.: The Case for a Digital Platform Agency And a New Approach to Regulatory Oversight” (Cambridge, MA: Harvard University, August 2020), [https://shorensteincenter.org/wp-content/uploads/2020/08/New-Digital-Realities\\_August-2020.pdf](https://shorensteincenter.org/wp-content/uploads/2020/08/New-Digital-Realities_August-2020.pdf).

form Commission<sup>10</sup>, a Digital Regulatory Agency<sup>11</sup> and a Digital Authority<sup>12</sup> have been proposed. While these ideas differ in some areas, for instance, what competencies an agency should exactly have and at what political level it should be situated, most of them build on one basic understanding: It is not sufficient anymore to rely on corporate self-regulation, since this approach has clearly failed in the past<sup>13</sup>, or to simply attach “platform issues” to existing oversight bodies.

This paper makes the case for a European Digital Services Coordinator specialized in enforcing due diligence rules for platforms offering citizens digital spaces where they exchange views with one another, consume and share news, and receive and send political messages. This includes social media sites, search engines<sup>14</sup>, video platforms and messenger services that have public, social networking functions. I focus on such platforms due to the potential role they can play in peoples’ opinion formation processes and societal debate. Additional European DSCs could be envisioned that address specific risks related to other types of platforms, for instance, online marketplaces.

Throughout the paper, I use examples from Germany to illustrate questions related to platform oversight. Germany provides interesting insights because it is one of the few countries worldwide that has introduced transparency and accountability legislation for social media sites and search engines. This paper does not strive to provide a full evaluation of these laws (for some laws, it is also too early to do so),

- 10 Harold Feld, “The Case for the Digital Platform Act,” *Public Knowledge*, May 2019, [https://www.publicknowledge.org/assets/uploads/documents/Case\\_for\\_the\\_Digital\\_Platform\\_Act\\_Harold\\_Feld\\_2019.pdf](https://www.publicknowledge.org/assets/uploads/documents/Case_for_the_Digital_Platform_Act_Harold_Feld_2019.pdf).
- 11 Paul M. Barrett, “Regulating Social Media: The Fight Over Section 230 – and Beyond” (New York, NY: NYU Stern Center for Business and Human Rights, September 2020), [https://static1.squarespace.com/static/5b6df958f8370af3217d4178/t/5f4d682af956e403bdd2dcf5/1598908459863/NYU+Section+230\\_FINAL+ONLINE+UPDATED\\_Aug+26.pdf](https://static1.squarespace.com/static/5b6df958f8370af3217d4178/t/5f4d682af956e403bdd2dcf5/1598908459863/NYU+Section+230_FINAL+ONLINE+UPDATED_Aug+26.pdf).
- 12 Fiona Scott Morton et al., “Stigler Committee on Digital Platforms. Final Report” (Chicago, IL: George J. Stigler Center for the Study of the Economy and the State at the University of Chicago Booth School of Business, 2019), <https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf>.
- 13 Heidi Beirich and Wendy Via, “Democracies Under Threat: How Loopholes for Trump’s Social Media Enabled The Global Rise of Far-Right Extremism” (Washington, DC: Global Project Against Hate and Extremism, March 16, 2021), [https://1897edad-2ee4-4b59-a583-57ac06e2e6c7.usrfiles.com/ugd/1897ed\\_16dc0be4f6e046a-79658d3343e31416a.pdf](https://1897edad-2ee4-4b59-a583-57ac06e2e6c7.usrfiles.com/ugd/1897ed_16dc0be4f6e046a-79658d3343e31416a.pdf); Amnesty International, “Surveillance Giants: How the Business Model of Google and Facebook Threatens Human Rights” (London: Amnesty International, November 21, 2019), <https://www.amnesty.org/en/documents/document/?indexNumber=pol30%2f1404%2f2019&language=en>; Frank Bass, Viviana Padelletti, and Bergen Smith, “All Change, No Fix: How Big Tech’s ‘Self-Regulation’ Fails Our Democracy” (Berkeley, CA: MapLight, March 2021), [https://decode.org/wp-content/uploads/2021/03/All-Change-No-Fix\\_-How-Big-Techs-Self-Regulation-Fails-Our-Democracy-3-2.pdf](https://decode.org/wp-content/uploads/2021/03/All-Change-No-Fix_-How-Big-Techs-Self-Regulation-Fails-Our-Democracy-3-2.pdf); Government of Latvia, “Non-Paper: Towards a Better Regulatory Environment against Disinformation in the EU” (Riga: Government of Latvia, March 2020), [https://g8fip1kplyr-33r3krz5b97d1-wpengine.netdna-ssl.com/wp-content/uploads/2020/03/Non-paper\\_Platforms-accountability.pdf](https://g8fip1kplyr-33r3krz5b97d1-wpengine.netdna-ssl.com/wp-content/uploads/2020/03/Non-paper_Platforms-accountability.pdf); Desmaris, Dubreuil, and Loutrel, “Creating a French Framework to Make Social Media Platforms More Accountable: Acting in France with a European Vision”; Melanie Smith, “Enforcement and Cooperation between Member States: E-Commerce and the Future Digital Services Act” (Brussels: Policy Department for Economic, Scientific and Quality of Life Policies, April 2020), 12–13, [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/648780/IPOL\\_STU\(2020\)648780\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/648780/IPOL_STU(2020)648780_EN.pdf).
- 14 Search engines should be part of the DSA, even though the original draft left it unclear whether they are, see Laura Kayali, “France, Germany Hint at Including Search Engines in Digital Services Act,” *POLITICO*, March 12, 2021, <https://pro.politico.eu/news/france-germany-hint-at-including-search-engines-in-digital-services-act>.





but some lessons can already be drawn. The German case also indicates where opposition to a European agency such as a European DSC might emerge, as the federal government and the federal states argue for keeping their own rules on platform rules and enforcement.

The paper has four main chapters before the concluding remarks. Chapter 2 presents the problem analysis, highlighting how new due diligence rules are not matched with a fitting oversight regime. Chapter 3 outlines some benefits of having a single European platform oversight agency and what roles national regulators would retain, even with an agency like the European DSC in place. Chapter 4 draws attention to the difficulties that would arise not only when trying to build a new EU agency, but also when sticking with the original draft or alternative regimes. Chapter 5 offers ideas for basic principles a European Digital Services Coordinator could follow. Overall, this paper argues that the innovative rules from the DSA require new, creative enforcement mechanisms that existing authorities do not always provide. However, I do not offer a comprehensive blueprint for such platform oversight, nor a detailed playbook for how platform regulatory measures such as audits and risk assessments should be designed. These discussions are still ongoing within academia, civil society, parliaments and regulatory bodies.



## 2. New European Rules for Platforms, but Old National Oversight Structures to Implement Them

The Commission presents the DSA draft as a major overhaul of EU regulation. It is meant to update the EU's E-Commerce Directive<sup>15</sup> from 2000 and provide a new regulatory framework fitting for online platforms that have developed since then. For the first time ever, online platforms are to face EU-wide accountability and transparency obligations. This is a different approach from the E-Commerce Directive, which only focused on liability rules regarding illegal content.<sup>16</sup> However, the proposed oversight structure in the DSA does not reflect this new due diligence approach. This chapter outlines the due diligence rules and the shortcomings of the oversight regime meant to enforce them.

### 2.1. Due Diligence Rules for Online Platforms

The DSA introduces new, mandatory transparency and accountability measures for platforms. The bigger the platform, the more rules they must adhere to and the stricter the rules are. The Commission introduces the term “very large online platforms” in the DSA, meaning platforms with over 45 million active monthly users in the EU. These very large online platforms would have to follow some key new rules under the DSA (see the annex for a more detailed breakdown of the platform rules). For the purposes of this paper, the due diligence rules in articles 23 to 33 are of special interest, which include:

- Transparency reports regarding content moderation
- Explanations of automated recommender systems and user controls for them
- Transparency databases for online advertising
- Annual audits
- Risk assessments regarding platforms' potential effects on citizens' fundamental rights
- Data access for the Commission, national regulators and researchers

<sup>15</sup> European Commission, “Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (‘Directive on Electronic Commerce’)” (2000), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:%3A32000L0031>.

<sup>16</sup> In the DSA, there are some updates and clarifications to liability rules, but the basic tenets of the regime essentially remain the same. What is new is the EU-wide mechanism for notice-and-action procedures regarding illegal content. Whereas the E-Commerce Directive only spelled this out broadly in one key article, the DSA contains a more detailed procedure including mandates for trusted flaggers (i.e., accredited people and organizations flagging illegal content) and measures against a misuse of this notice-and-action procedure. This part of the law is most crucial for civil law issues such as lawsuits on hate speech. A further analysis of this part of the law is beyond the scope of this paper. For an initial review of this part of the DSA and some changes in wording that could be crucial, see Daniel Holznel, “Chapter II des Vorschlags der EU-Kommission für einen Digital Services Act,” *Computer und Recht*, no. 2/2021 (February 15, 2021): 123–32, <https://online.otto-schmidt.de/db/dokument?id=cr.2021.02.i.0123.01.a>.



Some of these rules relate to the established liability regime with its rules for dealing with illegal content (“notice-and-action mechanism”). For instance, transparency reports need to include the numbers of actions taken against illegal content. Other rules are new and untested. For example, platforms have never been legally required to conduct risk assessments or audits. Some of the largest tech companies have done this voluntarily with a limited scope or after a court order. Data access mandates have not been part of EU law for online platforms before, either. Therefore, many of these rules need further clarification.<sup>17</sup>

Only a few countries worldwide have experimented with due diligence rules for social networks and search engines. In Germany, the Network Enforcement Act (“Netzwerkdurchsetzungsgesetz”, NetzDG<sup>18</sup>) requires some platforms to have content moderation regimes in place and to file transparency reports on these regimes regularly. German media regulation was updated to address social media sites, search engines and video apps more clearly. For the first time ever, the Interstate Media Treaty (“Medienstaatsvertrag”, MStV<sup>19</sup>) now contains rules mandating that platforms explain their recommender systems. There are also some enhanced rules on online advertising transparency.

Such national solo efforts to regulate global platforms have been met with criticism. Both the NetzDG and the MStV faced serious concerns regarding their compatibility with European law. The NetzDG draft as well as subsequent reform proposals provoked legal debates over their conformity with European law, especially regarding the country-of-origin principle.<sup>20</sup> In short, based on this principle, critics of the NetzDG (including social media platforms) have argued that the law cannot regulate platforms that are not based in Germany without breaching EU law. For the MStV, it

17 This paper does not offer such clarifications, but for why this is necessary, see ARTICLE 19, “At a Glance: Does the EU Digital Services Act Protect Freedom of Expression?,” ARTICLE 19, February 11, 2021, <https://www.article19.org/resources/does-the-digital-services-act-protect-freedom-of-expression/>; Mackenzie Nelson and Friederike Reinhold, “The DSA Proposal Is a Good Start. Now Policymakers Must Ensure That It Has Teeth.,” *AlgorithmWatch*, December 16, 2020, <https://algorithmwatch.org/en/dsa-response/>; Bitkom, “Bitkom Position DSA” (Berlin: Bitkom, March 29, 2021), [https://www.bitkom.org/sites/default/files/2021-03/20210326\\_bitkom\\_position\\_dsa.pdf](https://www.bitkom.org/sites/default/files/2021-03/20210326_bitkom_position_dsa.pdf).

18 Bundesamt für Justiz, “Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken” (2017), <https://www.gesetze-im-internet.de/netzdg/BJNR335210017.html>.

19 Since media regulation is a state-level competency in Germany, the MStV is a treaty between the 16 German federal states, see Staatskanzlei Rheinland-Pfalz, “Staatsvertrag zur Modernisierung der Medienordnung in Deutschland” (2020), <https://www.rlp.de/fileadmin/rlp-stk/pdf-Dateien/Medienpolitik/Medienstaatsvertrag.pdf>.

20 Very basically, the country-of-origin principle means that platforms are subject to the law of the member state where their European headquarters are. For a summary of legal positions on the country-of-origin principle, especially relating to NetzDG, see Wissenschaftliche Dienste des Deutschen Bundestags, “Der Entwurf des Netzwerkdurchsetzungsgesetzes: Vereinbarkeit mit dem Herkunftslandprinzip” (Berlin: Deutscher Bundestag, May 29, 2017), <https://www.bundestag.de/resource/blob/510384/c5bdf3939cf1a4529d2f7abf11065ee5/pe-6-032-17-pdf-data.pdf>; Wissenschaftliche Dienste des Deutschen Bundestags, “Marktortprinzip und Herkunftslandprinzip im Entwurf eines Gesetzes zur Änderung des Netzwerkdurchsetzungsgesetzes” (Berlin: Deutscher Bundestag, June 15, 2020), <https://www.bundestag.de/resource/blob/691846/cb11c99d9a39b6e73151549e22d76b73/WD-10-023-20-pdf-data.pdf>.



took strong last-minute lobbying from German business interests and politicians to alleviate EU concerns over potential breaches of the country-of-origin principle.<sup>21</sup>

Overall, introducing EU-wide due diligence rules for big tech companies is a welcome addition to a platform regulation approach that has so far focused mostly on removing illegal content in a national context. It recognizes that issues around explanations of recommender systems, audits and data access for researchers need to be addressed at the EU-level, not least because they concern big online platforms such as Facebook, Twitter and YouTube. These companies each follow the same business model across the EU and have apps that work very similarly across the EU. Considering this need for EU-wide due diligence rules and considering the legal tussle over German platform laws, it would be helpful if the DSA established a clear oversight structure to enforce new due diligence rules. The draft fails to do that, however, because it relies too much on existing regulatory structures.

## **2.2. Overreliance on the Commission and Existing National Regulators**

Enforcement of the DSA relies on the Commission and existing national regulators, such as telecommunications, media and consumer protection authorities. This could spell trouble for consistent enforcement of the DSA because national regulators might not be well-equipped to handle the new oversight tasks. This concern also applies to the Commission, which is first and foremost an executive body and not an expert regulator.

The draft places enforcement duties with member states “in principle” (recital 72), but at the same time, foresees “strong (...) enforcement powers” for the Commission (recital 98). Each member state is to designate one national competent authority as the “Digital Services Coordinator” (DSC). The DSC is supposed to be a single point of contact for the Commission and platforms for questions related to the DSA. The DSC must be independent, and it has enforcement powers, including searching platform premises and issuing fines (see the annex for details).

Relying on national regulators risks fragmented and inconsistent enforcement of DSA rules, especially regarding the newly introduced rules for due diligence. Downsides of weak enforcement of generally useful rules have been observed with the GDPR. Enforcement of the GDPR hinges greatly on the Irish data protection authority

<sup>21</sup> Laura Kayali, “Lobbying Push Prompts Brussels to Soften Concerns over German Media Law,” *POLITICO*, April 29, 2020, <https://www.politico.eu/article/lobbying-push-prompts-brussels-to-soften-concerns-over-german-media-law/>; Michael Hanfeld, “Brüssel sorgt für Unruhe: Killt die EU die Medienpolitik?,” *FAZ.NET*, April 24, 2020, <https://www.faz.net/aktuell/feuilleton/medien/die-eu-kommission-koennte-den-medienstaatsvertrag-kippen-16738781.html>; Michael Hanfeld, “EU billigt Mediengesetz: Im digitalen Sandkasten,” *FAZ.NET*, May 2, 2020, <https://www.faz.net/1.6745740>.

because the European headquarters of many of the biggest tech companies are in Ireland. This situation has been criticized by German data protection authorities<sup>22</sup> and external observers<sup>23</sup>, as they are concerned about weak enforcement of EU data protection rules by Irish authorities.<sup>24</sup> Even considering that it takes time to create the necessary enforcement structures, it is safe to say that within the first three years since the GDPR was applied, it has not altered platforms' approaches to data protection practices very much. Fines can sanction breaches, but the fines have yet to change much about the basic fact that big tech companies still set the tone for privacy standards online. Although it is laudable that companies like Apple and Google are considering improvements regarding privacy in their online tracking and their app store rules, respectively<sup>25</sup>, decisions that determine what data protection and privacy at platforms look like should not only be left to corporations. Similarly, inconsistent and weak enforcement of the DSA risks that decisions about platform design, transparency and accountability will continue to rest solely with corporate leaders.

For enforcement of the GDPR, every member state already had data protection laws and a data protection authority. In contrast, for the DSA's due diligence rules, few member states have similar obligations and accompanying oversight bodies in place. The draft expects national regulators to take on new tasks and develop expertise on DSA topics. Although some national regulators might be able to expand their staffs and build expertise, others cannot or it will take much longer to do so. Still others already have some of the oversight powers the DSA demands and will be reluctant to give up these powers, which are based on national prerogatives and laws. For the latter case, Germany provides an example with its NetzDG and MStV laws (see 2.1.). Unsurprisingly, the German federal government<sup>26</sup> and the German federal

22 Nicholas Vinocur, "‘We Have a Huge Problem’: European Regulator Despairs over Lack of Enforcement," *POLITICO*, December 27, 2019, <https://www.politico.eu/article/we-have-a-huge-problem-european-regulator-despairs-over-lack-of-enforcement/>; Hamburg Commissioner for Data Protection and Freedom of Information, "Data Protection as Fundamental Right – Big Demand, Long Delivery Time" (Hamburg: Hamburg Commissioner for Data Protection and Freedom of Information, February 13, 2021), [https://datenschutz-hamburg.de/assets/pdf/2020-02-13\\_press-release\\_annual\\_report\\_2019.pdf](https://datenschutz-hamburg.de/assets/pdf/2020-02-13_press-release_annual_report_2019.pdf).

23 Estelle Massé, "Two Years Under the EU GDPR – An Implementation Progress Report: State of Play, Analysis, and Recommendations" (Brussels: Access Now, 2020), 13–14, <https://www.accessnow.org/cms/assets/uploads/2020/05/Two-Years-Under-GDPR.pdf>; see also David Martin, "The Long and Winding Road: Two Years of the GDPR: A Cross-Border Data Protection Enforcement Case from a Consumer Perspective" (Brussels: Bureau Européen des Unions de Consommateurs, 2020), [https://www.beuc.eu/publications/beuc-x-2020-074\\_two\\_years\\_of\\_the\\_gdpr\\_a\\_cross-border\\_data\\_protection\\_enforcement\\_case\\_from\\_a\\_consumer\\_perspective.pdf](https://www.beuc.eu/publications/beuc-x-2020-074_two_years_of_the_gdpr_a_cross-border_data_protection_enforcement_case_from_a_consumer_perspective.pdf).

24 The Commission generally acknowledges enforcement issues in its official evaluation as well, see European Commission, "Data Protection as a Pillar of Citizens' Empowerment and the EU's Approach to the Digital Transition -Two Years of Application of the General Data Protection Regulation (COM(2020) 264 Final)" (Brussels: European Commission, June 24, 2020), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0264>.

25 Mark Scott and Vincent Manancourt, "Google and Apple Are the World's Biggest Privacy Regulators," *POLITICO*, April 27, 2021, <https://www.politico.eu/article/google-apple-privacy-regulators-gdpr-floc/>.

26 Cf. Kayali, "France, Germany Hint at Including Search Engines in Digital Services Act."

states<sup>27</sup> are keen to bolster their respective oversight bodies: Essentially, the federal government likely wants its Federal Office of Justice (“Bundesamt für Justiz”, BfJ) to enforce specific NetzDG transparency rules, and state media authorities want to maintain their specific approach to overseeing recommender system rules from the MStV. Taken together, these different starting points across the EU could exacerbate the risks of uneven and inconsistent enforcement of the DSA. Generally, there seems to be an expectation that existing regulators can and should just add platform-specific oversight duties to their portfolios. This belies the complexities of regulating platforms, which require new structures and new modes of knowledge-gathering and -sharing (to be discussed in the following chapters).

Seemingly having learned from the GDPR experience, and to enable consistent enforcement, the DSA draft foresees an enforcement role for the Commission as well. Mostly for cases involving very large online platforms, the Commission can investigate, enforce rules and issue sanctions. It also chairs a newly created European Board for Digital Services. This board is made up of national DSCs, is supposed to advise the Commission and the DSCs, and to issue opinions and recommendations. The board, however, cannot sanction or otherwise compel regulators to follow its opinions.

As laudable as it is to try and improve enforcement of the DSA compared to that of the GDPR, the proposed bigger role for the Commission creates its own problems. The Commission is not an expert regulator but chiefly an executive body, so expertise to oversee platforms might be missing. In the text accompanying the DSA draft, the Commission recognizes its need to make up for the lack of expertise. Yet little consideration is given as to whether it is wise to leave both the development and the enforcement of rules for platforms with the same body.<sup>28</sup>

Overall, the DSA seems like a twisted compromise between leaving enforcement solely to member states and establishing the Commission as the DSA enforcer. The ambiguity in the set-up is also reflected in observers’ reactions to it, at least in Germany. Some commentators are concerned about a “super regulator”<sup>29</sup> in Brussels, pointing out the strong role of the Commission and the lack of recognition for nation-

27 Deutscher Bundesrat, “Drucksache 96/21 zum Vorschlag für eine Verordnung des Europäischen Parlaments und des Rates über einen Binnenmarkt für digitale Dienste (Gesetz über digitale Dienste) und zur Änderung der Richtlinie 2000/31/EG COM(2020) 825 final; Ratsdok. 14124/20D” (Berlin: Deutscher Bundesrat, March 26, 2021), 4–5, [https://www.bundesrat.de/SharedDocs/drucksachen/2021/0001-0100/96-21\(B\).pdf?\\_\\_blob=publicationFile&v=1](https://www.bundesrat.de/SharedDocs/drucksachen/2021/0001-0100/96-21(B).pdf?__blob=publicationFile&v=1).

28 Cf. Center for Democracy & Technology, “Feedback to the European Commission’s Consultation on the Draft Proposal on the Digital Services Act” (Brussels: Center for Democracy & Technology, March 31, 2021), <https://cdt.org/wp-content/uploads/2021/04/2021-03-31-Feedback-to-the-European-Commissions-consultation-on-the-draft-proposal-on-the-Digital-Services-Act.pdf>.

29 Michael Hanfeld, “Bundesrat!,” *FAZ.NET*, March 31, 2021, <https://zeitung.faz.net/faz/medien/2021-03-31/b7e9e-82a222618aca45b192350d6d962>; translation by the author.



al agencies<sup>30</sup>. Such criticism also comes from the German states<sup>31</sup> and state-level media regulatory authorities<sup>32</sup>. A contrarian view is that the procedures to get the Commission involved are so long and involve so many points at which companies and national regulators can chime in that the Commission is actually only “leading from behind”.<sup>33</sup> And indeed, there are lots of different steps until action is taken that have to be coordinated between the Commission, the DSC in the country where a company is based (DSC of establishment), the DSC in the country where potential DSA infringements happened (DSC of destination), potentially other national regulators and the European Board for Digital Services.

Regardless of the interpretation of the Commission’s role in DSA enforcement, the crucial point is that the draft does not provide for a specialized oversight authority for platforms. This, however, is precisely what could ensure strong, consistent enforcement of the DSA. For this purpose, a platform agency could be established at the EU level in the form of a European Digital Services Coordinator.

30 Torsten J. Gerpott, “Machtkonzentration bei der EU-Kommission vermeiden,” *teltarif.de*, February 1, 2021, <https://www.teltarif.de/online-plattformen-regulierung/news/83356.html>; Quirin Weinzierl, “Institutionalizing Parallel Governance: The Digital Services Act, Platform Laws, Prosecutors, and Courts,” *Verfassungsblog*, December 18, 2020, [https://intr2dok.vifa-recht.de/receive/mir\\_mods\\_00009687](https://intr2dok.vifa-recht.de/receive/mir_mods_00009687).

31 Deutscher Bundesrat, “Drucksache 96/21 zum Vorschlag für eine Verordnung des Europäischen Parlaments und des Rates über einen Binnenmarkt für digitale Dienste (Gesetz über digitale Dienste) und zur Änderung der Richtlinie 2000/31/EG COM(2020) 825 final; Ratsdok. 14124/20D.”

32 Die Medienanstalten, “Digital Services Act und Digital Markets Act der EU – Eingabe der Medienanstalten im Konsultationsprozess der EU-Kommission,” March 30, 2021, [https://www.die-medienanstalten.de/fileadmin/user\\_upload/die\\_medienanstalten/Ueber\\_uns/Positionen/20210330\\_DSA\\_DMA\\_Stellungnahme\\_DLM\\_final.pdf](https://www.die-medienanstalten.de/fileadmin/user_upload/die_medienanstalten/Ueber_uns/Positionen/20210330_DSA_DMA_Stellungnahme_DLM_final.pdf).

33 Daniel Holznagel, “Ireland Cannot Do It Alone,” *Verfassungsblog*, April 27, 2021, <https://verfassungsblog.de/dsa-ireland/>.



### 3. The Case for a Single EU-level Digital Services Coordinator

The DSA introduces the idea of designating “Digital Services Coordinators” at the national level. Instead of situating this coordinator in member states, an entity at the EU level could be envisioned for the new due diligence rules: a European DSC. For the enforcement of these rules, the proposed European Board for Digital Services and the Commission’s enforcement role should be removed from the draft. National regulators would still retain many of their powers.

#### 3.1. Benefits of Having a European Digital Services Coordinator

There are four main benefits of building a new platform agency and doing so at the European level. A European DSC would:

1. Address platform issues of EU-wide concern across policy fields: Establishing a European DSC recognizes that some DSA due diligence rules, especially those for social media sites and search engines, should be handled at the EU level. The way corporate algorithms and recommender systems spread content is essentially the same across the entire EU. Enforcing rules on this is not a question regarding just individual pieces of content in individual, national (media) markets. It is a question of platform design, which is of supranational concern. It cannot be confined to a single (national) regulatory field, but simultaneously touches multiple areas such as consumer protection, media regulation, data protection and competition.
2. Allow for a unified approach towards big tech companies: A key benefit of a European DSC is that the EU would speak with one voice when dealing with large, global platforms such as Facebook, Google and TikTok. Platforms must, of course, follow national laws and enact regulators’ rules, no matter how small the regulators are. But the European DSC would be able to say that it enforces DSA rules on behalf of 27 EU member states, giving it more strength when standing up to big tech companies. It would also circumvent the potential problem of some European governments refusing to establish independent, well-staffed national DSCs, which relates to the next point.
3. Prevent forum shopping: With a strong European DSC, platforms would find it harder to pick a country with the most favorable regulations for them to establish their headquarters. This issue of “forum shopping” has been discussed as one



potential downside of the country-of-origin principle.<sup>34</sup> As the example of GDPR enforcement showed (see 2.2.), overly lenient or weak national enforcement – whether purposeful or not – can undermine well-meaning EU rules.

4. Forge new ways of stakeholder involvement: A new European agency might find it easier than well-established regulators to create new processes for intra-agency transparency and knowledge-sharing as well as to attract talent. The complexities of platform regulation require different approaches to regulation than before, including institutionalized exchanges with external experts, which could be included in the design of the DSC from the start.

A European DSC would have several other benefits. It would replace the intricate cooperation system between the Commission, Board and national DSCs: The European DSC could serve as a single point of contact for national regulators and platforms, and could delegate tasks that do not fall under its scope to member states (hence the “coordinator” title<sup>35</sup>). This would ensure consistency by preventing redundant or even contradictory implementation of the DSA in the member states. A single European DSC for social media and search engines might even reduce financial costs for enforcement, if oversight tasks are not replicated or must be coordinated in member states. Implementation decisions on the DSA’s due diligence rules could be reached faster than with the currently proposed processes.

Building the European DSC to reap most of these benefits would require that it is:

- Tailor-made for social media and search engines (see 5.1.): The DSA could establish a dedicated European DSC to focus squarely on social media sites and search engines. There is currently no such regulator at the national or European levels. With no other tasks to focus on, this agency could deal with difficult questions that are particular to such platforms and of European concern, including: What are systemic risks regarding freedom of expression and free opinion formation emanating from platforms? What is a good transparency report and a good audit, who are those for and who can check them? What platform design features could and should be made mandatory to support and not undermine citizens’ opinion formation?

<sup>34</sup> The legal discussion on the merits and downsides of the country-of-origin principle as it relates to tech companies is not provided in this paper, but can be found, for instance, in Daniel Holznagel, “Platform Liability for Hate Speech & the Country of Origin Principle: Too Much Internal Market?,” *Computer Law Review International* 21, no. 4 (August 15, 2020): 103–9, <https://doi.org/10.9785/cr-2020-210403>; Wolfgang Schulz and Thorsten Grothe, “Caution, Loose Cornerstone: The Country of Origin Principle under Pressure,” *Media@LSE*, July 4, 2016, <https://blogs.lse.ac.uk/medialse/2016/07/04/caution-loose-cornerstone-the-country-of-origin-principle-under-pressure/>; Marc Liesching, *Das Herkunftslandprinzip der E-Commerce-Richtlinie und seine Auswirkung auf die aktuelle Mediengesetzgebung in Deutschland* (Berlin: Carl Grossmann Verlag, 2020), <https://www.carlgrossmann.com/liesching-das-herkunftslandprinzip-der-e-e2%80%90commerce-richtlinie-und-seine-auswirkung-auf-die-aktuelle-mediengesetzgebung-in-deutschland/>.

<sup>35</sup> The name “Digital Services Coordinator” is mostly chosen to stay close to DSA terminology, but the title can be changed.

- Focused on due diligence for platform design (see 5.2.): Emphasizing such questions of due diligence and platform design is an overdue addition to platform regulation that has too often focused on only national criminal code matters and illegal content.
- Independent (see 5.3.): Since social media and search engines help citizens form their political opinions and since people in power use them to advertise themselves and their ideas, the DSC needs to be free from government and industry capture. At the moment, some national regulators in the EU, which could play a role in enforcing the DSA, are under strong pressure from ruling political and/or business leaders.
- Open (see 5.4.): To continuously expand expertise on platform design and platform regulation, new, institutionalized modes of knowledge-sharing between regulators and external stakeholders such as researchers, citizens and the media are necessary. Instead of relying on national regulators to be retrofitted to do this, the European DSC can build such systems from the ground up.
- Well-funded (see 5.5.): The European DSC needs to have adequate resources in order to fulfill its tasks of enforcing rules for large platforms. It also needs to be able to attract expert staff from diverse fields and not exclusively lawyers trained in a specific policy area, which has often been the case for (national) regulators so far.

### 3.2. The Role for National Regulators

Establishing a European DSC with the clearly delineated task of enforcing the DSA's due diligence rules for social media and search engines would mean that other issues with enforcing the DSA remain with national regulators. Liability questions and the related notice-and-action mechanism stay with member states' regulators and courts, just like in the E-Commerce Directive. Only the new, additional rules the DSA introduces are enforced for social media sites and search engines by the European DSC (specifically, articles 23 through 33 in the original DSA draft; see the annex). In most national contexts, this would create neither redundancies nor disputes over responsibilities between the EU and member states because most member states do not have rules and accompanying oversight for social media sites and search engines concerning recommender systems, audits, risk assessments and transparency mandates. Member states could supplement their own national regulators with the European DSC for DSA matters. Especially for countries that lack the resources to quickly develop extensive knowledge on platform regulation, this could be a valuable asset.

Still, there are a few countries with their own rules on platform regulation, which might overlap with DSA rules. Most prominently, Germany has taken a lead on establishing national legislation touching upon recommender systems and transparency reporting (see 2.1.). Learning from the successes and failures in enforcing these rules could help improve enforcement of the DSA. For instance, the NetzDG succeeded in establishing domestic points of contact at the platforms and required transparency reports. But it took several reforms to at least partially correct initial ambiguities and weaknesses in the law that had led to the first reports being rather meaningless and not allowing for comparisons between platforms.<sup>36</sup> Enforcing the rules was also difficult. A fine that Facebook had to pay for failing to meet NetzDG transparency guidelines was still outstanding more than a year and half after it was issued because Facebook challenged it.<sup>37</sup> The MStV leaves open questions, too. It introduces first-of-its-kind requirements for explaining recommender systems, which can be seen as a success. At the same time, the rules for non-discrimination of journalistic-editorial content have been questioned, as they might be ill-suited for search engines and online platforms that users specifically seek out to get sorted, prioritized content.<sup>38</sup> Moreover, the compatibility of both these German laws with EU law is questioned (see 2.1.). Nevertheless, German lawmakers and regulators have successfully argued that they can and should regulate social networks and search engines. They continue to make this claim regarding the DSA draft. With the German case in mind, two options seem feasible to streamline the interplay between the European DSC and national regulators in cases of overlap with the DSA.

One option is to allow for exemptions in the DSA. This is the demand both the German federal government<sup>39</sup> and the German federal states<sup>40</sup> make: They suggest that the DSA should allow member states to enact and enforce their own laws specifically in the field of media pluralism and hate speech (see also 2.2.). An exemption or opening clause for this type of member-state-first legislation could be a solution. As an example, explanations of the recommender systems (which are covered both in the DSA and MStV) would follow DSA rules and would be enforced by the European DSC, but German media regulators would enforce their rules on non-discrimination in recommender systems (which are not covered in the DSA, but in the MStV). The

36 Bundesministerium der Justiz und für Verbraucherschutz, "Bericht Der Bundesregierung Zur Evaluierung Des Gesetzes Zur Verbesserung Der Rechtsdurchsetzung In Sozialen Netzwerken (Netzwerkdurchsetzungsgesetz – NetzDG)" (Berlin: Bundesministerium der Justiz und für Verbraucherschutz, September 9, 2020), 33–34, [https://www.bmjv.de/SharedDocs/Downloads/DE/News/PM/090920\\_Evaluierungsbericht\\_NetzDG.pdf;jsessionid=7E-51C02EAE38F74D7D593137E86743F5.1\\_cid297?\\_\\_blob=publicationFile&v=1](https://www.bmjv.de/SharedDocs/Downloads/DE/News/PM/090920_Evaluierungsbericht_NetzDG.pdf;jsessionid=7E-51C02EAE38F74D7D593137E86743F5.1_cid297?__blob=publicationFile&v=1); Das NETTZ, "Stellungnahme aus der Zivilgesellschaft zu dem Entwurf eines Gesetzes zur Änderung des Netzwerkdurchsetzungsgesetzes (NetzDG)," *Das NETTZ*, February 17, 2020, <http://www.das-nettz.de/stellungnahme-aus-der-zivilgesellschaft-zu-dem-entwurf-eines-gesetzes-zur-aenderung-des->

37 Tomas Rudl, "Blackbox: Wie Facebook das NetzDG aushöhlt," *netzpolitik.org*, February 26, 2021, <https://netzpolitik.org/2021/blackbox-wie-facebook-das-netzdg-aushoehlt/>

38 Stephan Dreyer and Wolfgang Schulz, "Schriftliche Stellungnahme Zum Zweiten Diskussionsentwurf Eines Medienstaatsvertrags Der Länder Vom Juli 2019" (Hamburg: Hans-Bredow-Institut, August 2019), [https://www.hans-bredow-institut.de/uploads/media/default/cms/media/lez8f8q\\_HBI\\_Stellungnahme2MStV.pdf](https://www.hans-bredow-institut.de/uploads/media/default/cms/media/lez8f8q_HBI_Stellungnahme2MStV.pdf)

39 Cf. Kayali, "France, Germany Hint at Including Search Engines in Digital Services Act."

40 Deutscher Bundesrat, "Drucksache 96/21 zum Vorschlag für eine Verordnung des Europäischen Parlaments und des Rates über einen Binnenmarkt für digitale Dienste (Gesetz über digitale Dienste) und zur Änderung der Richtlinie 2000/31/EG COM(2020) 825 final; Ratsdok. 14124/20D," 4–5.



European Board for Digital Services could serve as a knowledge-sharing forum for national regulators, so that German regulators could share their experiences with others. Nonetheless, this would lead to a piece-meal approach to platform oversight. It would allow member states to set their own rules, though. It seems likely that national regulators and lawmakers will continue to push this option.

Another option is for national lawmakers and regulators to stop clinging to the notion that algorithmic accountability, human-rights based risk assessments and data access are national issues and not common, EU-wide issues in need of EU-level oversight. This, however, seems unlikely, as lawmakers and politicians may be unwilling to divert from the regulatory paths they have already chosen. In addition to this question of path dependency regarding legacy regulators, there are other hurdles to building a European DSC. These hurdles are explored in the next chapter, along with ways to overcome them.



## 4. Building a European DSC Is Hard, but So Are the Alternatives

Calls for dedicated platform oversight agencies are well-known in the German, EU and US regulatory debates. They have only seldom yielded any results. It takes political will and capital to develop a new agency. This does happen from time to time. The EU is in the process of building a European Labour Authority and several other new bodies are planned.<sup>41</sup> In Germany over the past two years, a new federal agency within the Foreign Office and a new cybersecurity agency were created. More to the point of the DSA, there will be a new federal-level agency for youth media protection, heavily expanding an existing regulatory body.<sup>42</sup> In the UK, a new Digital Markets Unit is being built to regulate big tech companies.<sup>43</sup> France is also considering a new tech regulator.<sup>44</sup> Getting agencies like this or a European DSC up and running with expert staff is a lengthy process, and there are other hurdles in building the DSC. But maintaining the original DSA draft comes with its own challenges.

### 4.1. Overcoming Hurdles When Building a European DSC

One of the biggest obstacles to building the European DSC is the strong path dependency related to existing institutional structures. Some policymakers and regulators might be unwilling to fully embrace a new platform oversight agency at the EU level. This could doom the European DSC before serious attempts at establishing it are even made. Member states' insistence on sticking with their own national rules was already visible during the early commenting on the draft. In Germany, both federal and state-level actors called for national exemptions in a bid to maintain their powers (see 3.2.). The Commission, for its part, might be unwilling to move away from its suggestion of a horizontal approach, which does not differentiate between various types of platforms.

A European DSC for social networks and search engines would oversee only a fraction of the platforms proposed to be covered in the first draft of the DSA. The interaction of this specialized regulator with the Commission, national DSCs, and the Board (as well as the oversight bodies proposed in the Digital Markets Act and in

41 For instance, a European Union Agency for the Space Programme and a EU Health Emergency Preparedness and Response Authority.

42 Stephan Dreyer, "Jugendschutzgesetz: Neu, aber auch besser?," *Tagesspiegel Background Digitalisierung & KI*, April 7, 2021, <https://background.tagesspiegel.de/digitalisierung/jugendschutzgesetz-neu-aber-auch-besser>.

43 UK Government, "New Watchdog to Boost Online Competition Launches," *GOV.UK*, April 7, 2021, <https://www.gov.uk/government/news/new-watchdog-to-boost-online-competition-launches--3>; Julia Angwin, "How the U.K. Is Gearing Up to Regulate Big Tech," *The Markup*, April 24, 2021, <https://www.getrevue.co/profile/themarkup/issues/how-the-u-k-is-gearing-up-to-regulate-big-tech-566707>.

44 Kayali, "France Sets Path for New Super Tech Regulator."

regulation on artificial intelligence) could make enforcement of the DSA more complex and not – as intended – more targeted. There is a risk that individual DSA rules will be enforced differently for different platforms. To prevent this, consideration must be given early on to how this sectoral oversight fits into the broader structure of DSA oversight bodies and how the respective roles of each body are delineated. If a European DSC for social networks and search engines were to emerge, some oversight functions from the Digital Markets Act could be shifted to the DSC. Specifically, the DSC could address interoperability issues. The long-term idea behind this is to build an independent, capable authority that can holistically deal with all interrelated issues concerning social media sites and search engines, including matters of due diligence of content moderation, competition and consumer protection.<sup>45</sup>

Building a European DSC would be a costly, years-long endeavor. This could be detrimental to overseeing an industry that is changing frequently and amassing more power along the way. However, building up expertise and reorganizing departments at existing agencies also takes long. For example, the NetzDG, enacted in 2017, has led to a reorganization and increased budgets at the BfJ. Only in mid-2021 did the department dealing with the NetzDG gain actual oversight powers. The BfJ is still in the process of establishing structures for overseeing platforms and attracting expert personnel. Similar efforts have been under way at media regulatory agencies for years. This shows that finding staff and gaining knowledge is a challenge, even when “just” reorganizing, and not building an agency from scratch.

Lastly, there could be legal challenges to having a European DSC. For instance, the German federal states already question whether the Commission might be overreaching when even just proposing certain requirements for oversight bodies in the member states.<sup>46</sup> It also needs to be clarified what enforcement powers the Commission would even be allowed to delegate to a new authority such as the European DSC. This legal discussion involving issues on subsidiarity and the country-of-origin principle is beyond the scope of this paper. It should be noted, though, that national efforts at regulating platforms also faced significant legal questions (see 2.1.). Instead of debating whether the country-of-origin principle allows national exemptions for platform regulation, it should be discussed how it might be amended to allow for EU oversight.

<sup>45</sup> Scholars who have argued for such a holistic approach include Morton et al., “Stigler Committee on Digital Platforms. Final Report”; Feld, “The Case for the Digital Platform Act”; Wheeler, Verveer, and Kimmelman, “New Digital Realities, New Oversight Solutions in the U.S.: The Case for a Digital Platform Agency And a New Approach to Regulatory Oversight.”

<sup>46</sup> Deutscher Bundesrat, “Drucksache 96/21 zum Vorschlag für eine Verordnung des Europäischen Parlaments und des Rates über einen Binnenmarkt für digitale Dienste (Gesetz über digitale Dienste) und zur Änderung der Richtlinie 2000/31/EG COM(2020) 825 final; Ratsdok. 14124/20D,” 4.

## 4.2. Challenges When Not Building a European DSC

For political, budgetary and/or legal reasons, lawmakers might refrain from building a European DSC. They could stick with the original draft or pursue alternative oversight systems. The biggest risk of the original draft is relying too much on existing agencies, which might lead to an uneven application of the DSA (see 2.2.). If the EU, nonetheless, chooses a decentralized, national approach, at the very least, member states need to provide more resources to their regulators. This could be just as costly as building a new agency. Other questions emerge when sticking with the status quo or contemplating alternative oversight regimes.

If the DSA draft remained unchanged, member states would each have multiple agencies enforcing parts of the DSA. This design is necessary because the draft covers many different platforms and different risks associated with them, some related to data protection, others to competition questions and still others to consumer protection. The idea seems to be to not rely on a single authority in a single policy field (as was the case with the GDPR). But this approach might not be well-suited to deal with some of the risks related to social media sites and search engines. For instance, in Germany, several regulatory and co-regulatory bodies at different political levels are working to tackle the spread of online disinformation.<sup>47</sup> Yet, a holistic approach to this issue is missing, as there is no body dealing explicitly with the very platform design that underpins the spread of disinformation. This is exactly the type of issue the DSA's due diligence rules should address.

The currently proposed set-up involving many national competent authorities and one DSC also gives rise to political questions. All these different agencies are meant to enforce the DSA together, but the national DSC might still be seen as a “first among equals”. It is, after all, the primary point of contact for platforms and the Commission that is to ensure coordination among competent authorities and seems to be the fallback position in case a national authority has difficulties enforcing the DSA. Picking one agency to be the DSC necessarily means not picking any of the other candidates. This choice might be seen to be driven by decisionmakers' personal political ambitions or by short-term electoral considerations. It also might prioritize one policy field over another, as German media regulators have pointed out<sup>48</sup>: If a media regulatory authority is the DSC, does that mean that media regulatory issues are more important than those more concerned with competition or data protection? And if one member state picks their consumer protection authority to be DSC

<sup>47</sup> Julian Jaursch, “Regulatory Reactions to Disinformation: How Germany and the EU Are Trying to Tackle Opinion Manipulation on Digital Platforms” (Berlin: Stiftung Neue Verantwortung, October 22, 2019), [https://www.stiftung-nv.de/sites/default/files/regulatory\\_reactions\\_to\\_disinformation\\_in\\_germany\\_and\\_the\\_eu.pdf](https://www.stiftung-nv.de/sites/default/files/regulatory_reactions_to_disinformation_in_germany_and_the_eu.pdf).

<sup>48</sup> Die Medienanstalten, “Digital Services Act und Digital Markets Act der EU – Eingabe der Medienanstalten im Konsultationsprozess der EU-Kommission,” 8.

and another member state its media regulation authority, does that say anything about the DSA policy priorities in the member states? In federal countries, additional hierarchy questions could be raised when choosing between state-level and federal-level regulatory bodies. In Germany, there are already controversial debates about the delineation of platform regulatory competencies between states and the federal level, for instance, on media regulation and youth protection, which could be exacerbated by a kind of casting show for the national DSC. Discussions about DSA rules and enforcement would therefore almost necessarily lead to complex and lengthy federalism reform debates. Such a debate would be helpful and long overdue in Germany, yet it does not lead to a much easier process than building a new European agency.

As an alternative to relying on national DSCs, the Commission could try to maintain or expand its strong enforcement position. But developing expertise at the Commission would also be a lengthy and costly process, especially considering the Commission will simultaneously be building several (potentially also redundant) new departments and bodies. That is because the proposed Digital Markets Act and the regulation on artificial intelligence also include an enforcement role for the Commission and new bodies to be established. The Commission would likely also face opposition from member states, which might be reluctant to give up or even just pool some of their national enforcement powers regarding platforms. Germany, as mentioned, has claimed a role for national regulators, and in the past, the Commission has not always succeeded in securing a strong enforcement role for itself. For example, in the original 2012 draft of the GDPR, the Commission proposed that it could coordinate some of the enforcement.<sup>49</sup> This idea was missing in the final version of the law. Member states' reluctance to leave enforcement of the DSA to the EU might also be a hurdle for creating a new European DSC. But it might be easier for member states to cede power to an expert authority than to the EU's executive body.

A different European-level model would be to give European regulatory networks (more) enforcement powers.<sup>50</sup> But this approach faces challenges, too. There are already a range of such networks for those areas touching upon platform regulation, among them the European Regulators Group for Audiovisual Media Services (ERGA), the European Competition Network (ECN), the Consumer Protection Cooperation (CPC) Network and the Body of European Regulators for Electronic Communications (BEREC). The ERGA especially seems to be keen on enhancing its (members') pow-

49 Art. 59-60, European Commission, "Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation)" (2012), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX-%3A52012PC0011&qid=1616672399381>.

50 This idea is favored, for instance, by the Group of the European People's Party in the European Parliament, see European People's Party, "EPP Group Position on the Digital Services Act (DSA)," *European People's Party*, January 20, 2021, <https://www.eppgroup.eu/newsroom/publications/epp-group-position-on-the-digital-services-act-dsa>.





ers.<sup>51</sup> Yet, resources are unevenly spread among these bodies, which might create difficulties for properly coordinating an EU-wide enforcement of the DSA via such networks. For instance, the ERGA only has a secretariat located within the Commission, whereas the BEREC has a coordination level established as an official EU agency. Again, building up expertise and reshuffling departments at existing agencies and networks is not guaranteed to be easier than designing an agency from scratch. More crucially, by relying only on these bodies without developing a DSC as a European platform agency, the DSA's enforcement will continue to be fragmented across policy fields and member states.

51 European Regulators Group for Audiovisual Media Services, “ERGA Statement on the European Commission's Proposals for a ‘Digital Services Act’ (DSA) and a ‘Digital Markets Act’ (DMA)” (Brussels: European Regulators Group for Audiovisual Media Services, March 29, 2021), 13–16, [https://erga-online.eu/wp-content/uploads/2021/03/ERGA-DSA-DMA-Statement\\_29032021.pdf](https://erga-online.eu/wp-content/uploads/2021/03/ERGA-DSA-DMA-Statement_29032021.pdf).



## 5. Main Pillars of a European Digital Services Coordinator

The European DSC should be well-designed to meet specific tasks, with checks in place to establish an oversight body accountable to the public. It should not duplicate existing regulatory regimes or merely set up agencies for the sake of setting up agencies, which is a common criticism when new oversight structures are built.<sup>52</sup> With a clear separation of tasks and powers, this issue can be alleviated. Devising an inter-agency coordination mechanism would further ensure that responsibilities are not duplicated but complement each other and that lessons from existing regulators are considered.<sup>53</sup> The following sections present some of the main characteristics a European DSC could have to perform specialized, independent platform oversight.

### 5.1. Focus on Social Media Sites and Search Engines

The European DSC should focus on social media sites and search engines, including video platforms. So far, the DSA draft does not foresee special oversight for these types of platforms that offer citizens digital spaces where they can reach lots of people and receive and share content. In fact, the original draft left open whether search engines are considered “platforms” at all.<sup>54</sup> It is necessary, though, to clearly specify what platforms are covered and what oversight is fitting for them. Commercial social media sites and search engines should be overseen by a dedicated EU agency due to their specific characteristics, their role in shaping peoples’ information spaces and the potentially associated risks.

20 years ago, when the E-Commerce Directive was developed, lawmakers had little possibility of anticipating the growth of social media and were mainly concerned with not overburdening a young and emerging tech industry with regulation.<sup>55</sup> Ten years ago, many platforms were hailed as enablers for democratic movements the world over, drowning out calls for their oversight. Now, after massive privacy breaches, public health disinformation campaigns, electoral interference, and study after study on potential discriminatory risks for individuals and societies associated with online platforms, it has become clear that it should not be solely up to these private

<sup>52</sup> In Germany, such criticism was raised, for example, when lawmakers created a new agency in the field of cybersecurity, see [tagesschau.de](https://www.tagesschau.de/inland/cyberagentur-105.html), “Gründungsurkunde der Cyberagentur unterzeichnet,” [tagesschau.de](https://www.tagesschau.de/inland/cyberagentur-105.html), August 11, 2020, <https://www.tagesschau.de/inland/cyberagentur-105.html>.

<sup>53</sup> For EU agencies, the European Court of Auditors has called for cooperation between agencies, see European Court of Auditors, “Special Report 22/2020: Future of EU Agencies – Potential for More Flexibility and Cooperation” (Luxembourg: European Court of Auditors, October 22, 2020), <https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=54740>.

<sup>54</sup> Kayali, “France, Germany Hint at Including Search Engines in Digital Services Act.”

<sup>55</sup> Holznaegel, “Chapter II des Vorschlags der EU-Kommission für einen Digital Services Act.” 124.



corporations to design and enforce rules for online communication spaces used by billions of people.

A key characteristic of these online communication spaces is their reliance on an ad-based business model using troves of personal behavioral data to train algorithms to provide personalized ads and other content. This distinguishes such social media and search engines from other online platforms primarily providing marketplaces as well as from traditional (media) companies.<sup>56</sup> As law professors K. Sabeel Rahman and Zephyr Teachout have pointed out, with the advent of the yellow press, advertising became a source of income for media companies providing news and entertainment, drawing parallels to today's platforms. However, never before was advertising such a big part of "media" companies' revenues and never before were ads so reliant on gathering and utilizing personal behavioral data.<sup>57</sup> In 2020, advertising made up about 92 percent of Google/YouTube's revenues<sup>58</sup> and 98 percent of Facebook/Instagram's<sup>59</sup>. As a comparison, in the "News Media" segment of German publishing company Axel Springer, ads contributed 44 percent of revenue in 2019.<sup>60</sup> In addition to quantitative differences, there are also qualitative differences with digital ad-based business models. Even considering that almost all companies try to gather personal data on users, including publishers and especially telecommunications companies<sup>61</sup>, "the granularity and immediacy of the targeting ability of digital platforms and the volume and scope of information that digital platforms have access to is a substantial step-change".<sup>62</sup>

This "step-change" could be addressed by a European DSC specialized in social media sites and search engines. This sector-specific approach would be an addition to the otherwise horizontal regulatory approach in the DSA, covering all types of platforms. It would acknowledge that these platforms cannot be compared to (still mostly national) traditional media or telecommunications companies. They

56 Cf. Ellen P. Goodman, "Digital Information Fidelity and Friction," Knight First Amendment Institute, February 26, 2020, [https://s3.amazonaws.com/kfai-documents/documents/c5cac43fec/2.27.2020\\_Goodman-FINAL.pdf](https://s3.amazonaws.com/kfai-documents/documents/c5cac43fec/2.27.2020_Goodman-FINAL.pdf); Elizabeth Hansen Shapiro et al., "New Approaches to Platform Data Research" (Washington, DC: NetGain Partnership, February 2021), <https://drive.google.com/file/d/1bPsMbaBXAROUYVesaN3dCtfaZpXZgl0x/view>; Feld, "The Case for the Digital Platform Act."

57 K. Sabeel Rahman and Zephyr Teachout, "From Private Bads to Public Goods: Adapting Public Utility Regulation for Informational Infrastructure," *Knight First Amendment Institute*, February 4, 2020, 15–16, <https://knightcolumbia.org/content/from-private-bads-to-public-goods-adapting-public-utility-regulation-for-informational-infrastructure>.

58 Alphabet, "Annual Report 2020" (Mountain View, CA: Alphabet, February 3, 2021), 33, [https://abc.xyz/investor/static/pdf/20210203\\_alphabet\\_10K.pdf?cache=b44182d](https://abc.xyz/investor/static/pdf/20210203_alphabet_10K.pdf?cache=b44182d).

59 Facebook, "Annual Report 2020" (Menlo Park, CA: Facebook, January 28, 2021), 52, <https://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/4dd7fa7f-1a51-4ed9-b9df-7f42cc3321eb.pdf>.

60 Axel Springer SE, "Annual Report 2019" (Berlin: Axel Springer SE, 2020), 33, [https://www.axelspringer.com/data/uploads/2020/03/annual\\_report\\_2019.pdf](https://www.axelspringer.com/data/uploads/2020/03/annual_report_2019.pdf).

61 Ranking Digital Rights, "2020 Ranking Digital Rights Corporate Accountability Index" (Washington, DC: Ranking Digital Rights, 2021), <https://rankingdigitalrights.org/index2020>.

62 Australian Competition and Consumer Commission, "Digital Platforms Inquiry – Final Report" (Canberra: Australian Competition and Consumer Commission, July 26, 2019), 6, <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>.



also carry risks related to freedom of expression and opinion formation that are less pronounced at online marketplaces. If social media and search engines are thus understood as their own industry, for which EU-wide transparency and accountability rules should apply, then enforcement should be handled by an industry-specific body at the EU level as well. This would be in line with historical examples of lawmakers devising tailor-made oversight regimes for certain industries, from railroads to telecommunications to medicines and chemicals.

## 5.2. Due Diligence Oversight, Not Content Oversight

Adding due diligence rules to the original liability framework of the E-Commerce Directive is a strong point of the DSA draft. Focusing too much on just content removal has been a flaw of previous legislative approaches, especially when it comes to tackling disinformation. Deleting illegal content is only one element of platform regulation. Different countries have different definitions for what is considered illegal content and the DSA's liability regime relies on these national definitions without changing or adding on to them. Yet, issues such as online disinformation and the viral spread of conspiracy myths do not necessarily concern illegal content, even though they can still harm people online and offline. On these issues, emphasizing content removal is merely treating the symptoms of structurally unsound platform designs. Such questions on platform design concern the way information and news are spread by algorithms, if and how well different types of content (such as personal communication, news and ads) are distinguishable from one another, but also compliance issues such as how platforms document, report and enforce their policies on content moderation and advertising.<sup>63</sup> The DSA addresses some of these issues with its due diligence mandates.

It is promising that the DSA moves in the direction of covering platform design issues. It will be vital that due diligence rules are evenly and consistently applied across the EU. The European DSC could focus squarely on this task. Criminal prosecution of potentially illegal content remains primarily a matter of national law enforcement and courts. Developing, implementing and enforcing rules on transparency and accountability measures for platforms across the EU, however, could be handled by a European agency.

<sup>63</sup> The need to cover not just content questions for platform regulation is highlighted, for example, in Nathalie Maréchal, Rebecca MacKinnon, and Jessica Dheere, "Getting to the Source of Infodemics: It's the Business Model" (New America: Ranking Digital Rights, May 27, 2020), <https://www.newamerica.org/oti/reports/getting-to-the-source-of-infodemics-its-the-business-model/>; Mathias Vermeulen, "Online Content: To Regulate or Not to Regulate – Is That the Question?" (Melville: Association for Progressive Communications, August 31, 2019), <https://www.apc.org/sites/default/files/OnlineContentToRegulateOrNotToRegulate.pdf>.

### 5.3. Independent and Free From Industry and Government Capture

With the task of overseeing social media and search engines, any regulator is bound to touch upon issues of citizens' fundamental rights. This is the case even when the regulatory focus is explicitly not on deleting illegal content and associated questions of freedom of speech and censorship, but on due diligence rules. Corporate decisions on recommender systems and targeted advertising have potential negative effects, even if there is no illegal or "harmful" content involved.<sup>64</sup> For example, algorithmic systems might exhibit race and/or gender biases<sup>65</sup>, and there are privacy concerns about tracking and profiling users online<sup>66</sup>. Considering also that social media sites and search engines carry content by and about political leaders and other decisionmakers, it is crucial that the DSC is free from corporate and governmental influence. These platforms are part of citizens' opinion formation processes on social and political issues. Therefore, oversight of these platforms needs to be independent from government and business. It should be done in the interest of the public, not in the interest of corporate or political leaders.

The DSA only partly recognizes this need for independent oversight. The draft calls for DSCs to be independent, but ensuring their independence is left to the member states and the DSA draft does not include a specific mechanism to check or improve the DSCs' structures. This could be a problem if political and/or business leaders put pressure on authorities in some member states. Regulatory authorities in the EU are not always sufficiently protected from such meddling.

The Commission itself, which is to have an enforcement role in the DSA, is an independent executive bureaucracy, but its leadership and mission are clearly political. This set-up risks a politicization of what should be subject matter debates on platform design and corporate compliance. Moreover, the Commission is a target for industry lobbying and has, at times, struggled with being open about its lobbying meetings.<sup>67</sup> Especially considering the strong lobbying efforts of tech companies, including on the DSA<sup>68</sup>, this does not bode well for countering corporate capture. The European DSC would also be a target for lobbyists and open to capture by industry

64 Ranking Digital Rights, "2020 Ranking Digital Rights Corporate Accountability Index."

65 Joy Buolamwini, *How I'm Fighting Bias in Algorithms*, 2017, [https://www.youtube.com/watch?v=UG\\_X\\_7g63rY](https://www.youtube.com/watch?v=UG_X_7g63rY); Cathy O'Neil, *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy* (New York, NY: Crown Random House, 2017).

66 Spandana Singh, "Special Delivery: How Internet Platforms Use Artificial Intelligence to Target and Deliver Ads" (Washington, DC: New America, February 18, 2020), [https://d1y8sb8igg2f8e.cloudfront.net/documents/Special\\_Delivery\\_FINAL\\_VSGyFpB.pdf](https://d1y8sb8igg2f8e.cloudfront.net/documents/Special_Delivery_FINAL_VSGyFpB.pdf); *Privacy International*, "Data Exploitation and Political Campaigning: A Company Guide Resource," Privacy International, 2020, <https://privacyinternational.org/long-read/4374/data-exploitation-and-political-campaigning-company-guide-resource>.

67 Lili Bayer, "Brussels Lobbying Business Picks up despite Pandemic," *POLITICO*, March 10, 2021, <https://www.politico.eu/article/brussels-lobbying-business-picks-up-despite-coronavirus-pandemic/>.

68 Corporate Europe Observatory, "Big Tech Brings out the Big Guns in Fight for Future of EU Tech Regulation," *Corporate Europe Observatory*, December 11, 2020, <https://corporateeurope.org/en/2020/12/big-tech-brings-out-big-guns-fight-future-eu-tech-regulation>; Max Bank, "Leak: Googles aggressive Lobbykampagne gegen neue Regeln für Big Tech," *LobbyControl*, October 29, 2020, <https://www.lobbycontrol.de/2020/10/leak-googles-aggressive-lobbykampagne-gegen-neue-regeln-fuer-big-tech/>.



and politics. One benefit of building it as a new agency is to address these risks head-on in the design of the DSC. For instance, a stand-alone transparency register for the DSC could be established.<sup>69</sup> There could also be a dedicated compliance process within the agency to minimize undue outside influence. A reporting requirement for the European DSC would allow the media, public and legislators to monitor the work of the DSC (such provisions are already included in the DSA for national DSCs). An institutionalized means to have exchanges with experts (see 5.4.) might further help in countering capture.

It might seem desirable to have a regulator which is not independent but controlled by the government. This would mean regulators could be held politically accountable: If an agency misses a glaring legal breach by a company, the head of the agency might be forced to resign. It is harder to hold an independent agency similarly accountable. However, the reverse is true as well: Politicians with much power over an agency might try to shape it to their liking or, if they have little will, interest or incentive to support this agency, might let it wither. This underlines the need for independence. At the minimum, this need for independence means not being funded directly by governments or companies, but rather through fees or a dedicated, independent endowment using donations or taxes from platforms.<sup>70</sup>

#### 5.4. Institutionalized Exchanges With External Experts

To oversee social media sites and search engines, a new approach to gain expertise and to share knowledge between regulators, academia, civil society and business is necessary. Platform designs change frequently, based on corporate decisions and on interactions users have with algorithms. Many ideas to oversee these business practices are in the early stages of development and therefore need to be fleshed out in more detail. For example, numerous questions around audits are still open.<sup>71</sup> Other DSA rules require specific expertise and capacities that not many regulators

<sup>69</sup> Cf. Morton et al., “Stigler Committee on Digital Platforms. Final Report,” 18.

<sup>70</sup> It would have to be ensured that a potential fund does not create the perverse incentive of companies to track users and advertise more. For general ideas on such funds, see Ethan Zuckerman, “The Case for Digital Public Infrastructure,” *Knight First Amendment Institute*, January 17, 2020, 10, 23–24, <https://s3.amazonaws.com/kfai-documents/documents/7f5fdaa8d0/Zuckerman-1.17.19-FINAL-.pdf>; Lisa Macpherson, “The Pandemic Proves We Need A ‘Superfund’ to Clean Up Misinformation on the Internet,” *Public Knowledge*, May 11, 2020, <https://www.publicknowledge.org/blog/the-pandemic-proves-we-need-a-superfund-to-clean-up-misinformation-on-the-internet/>.

<sup>71</sup> While auditing is certainly a well-known and tested oversight mechanism in other industries, it is as of now unclear what an audit could look like that is supposed to determine whether tech companies explained their recommender systems well enough, what “risk mitigation” means for automated content moderation and how to check the usefulness of ad repositories. That is not to speak of actually “auditing algorithms”, as there is no consensus yet on what constitutes a “good” algorithm audit. See, e.g., Ada Lovelace Institute and DataKind UK, “Examining the Black Box: Tools for Assessing Algorithmic Systems” (London: Ada Lovelace Institute, April 2020), <https://www.adalovelaceinstitute.org/wp-content/uploads/2020/04/Ada-Lovelace-Institute-DataKind-UK-Examining-the-Black-Box-Report-2020.pdf>; Mona Sloane, “The Algorithmic Auditing Trap,” *OneZero*, March 17, 2021, <https://onezero.medium.com/the-algorithmic-auditing-trap-9a6f2d4d461d>.



have, such as the capacity to analyze large databases of platforms.<sup>72</sup> To deal with these issues, regulators need to be able to consult with a diverse and well-resourced group of experts in an institutionalized manner.<sup>73</sup>

The current draft provides few incentives to forge new modes of stakeholder engagement. The Commission and national regulators simply receive more tasks to be inserted into their existing structures, but no continuous exchange with stakeholders is foreseen. There are only isolated instances of regulators interacting with outside expertise. For example, the data access provisions allow academic researchers to get their hands on platform data based on national regulators' requests to platforms. Also, the European Board for Digital Services may invite experts to its meetings. In addition, the Commission has set aside a budget for consultations on data access and risk assessments.<sup>74</sup> Yet, a more permanent and flexible form of exchange with the public and other experts is necessary, beyond just consultations for draft laws or acts.

Revisions of the draft should include an institutionalized form of exchange with external experts. Such an exchange is also conceivable at existing authorities and is, in fact, often already a reality. However, when setting up a new agency, a mechanism for knowledge exchange could explicitly become part of its remit, in addition to the more traditional tasks of regulation, own research and public relations. A regular and open exchange should include experts from various fields as well as from other regulatory agencies.

## 5.5. Adequate Expertise and Resources

Inadequate resources and a lack of expert staff would hinder the European DSC to fulfill its task. Therefore, it is necessary to equip the DSC with a sizable budget and to ensure that it can attract experts from a variety of fields. GDPR enforcement serves as an example of what happens if regulators do not have enough resources:

72 Cf. Caroline Cauffman and Catalina Goanta, "A New Order: The Digital Services Act and Consumer Protection," *European Journal of Risk Regulation*, April 15, 2021, <https://www.cambridge.org/core/journals/european-journal-of-risk-regulation/article/new-order-the-digital-services-act-and-consumer-protection/8E34BA8A209C61C42A1E7ADB6BB904B1>.

73 This could help build a "critical community" on European platform regulation, cf. Chris Riley, "The Need for a Robust Critical Community in Content Policy," *Techdirt*, September 25, 2020, <https://www.techdirt.com/articles/20200922/17314945362/need-robust-critical-community-content-policy.shtml>; for the idea of an "expert pool" to advise regulators, see Ben Wagner and Carolina Ferro, "Governance of Digitalization in Europe. A contribution to the Exploration: Shaping Digital Policy – Towards a Fair Digital Society?" (Gütersloh: Bertelsmann Stiftung, May 2020), [https://www.bertelsmann-stiftung.de/de/system/pdf?tx\\_rsbrowserlesspdf\\_pi1%5Burls%5D%5B0%5D=https%3A%2F%2Fwww.bertelsmann-stiftung.de%2Fde%2Fpublikationen%2Fpublikation%2Fdid%2Fgovernance-of-digitalization-in-europe%3Fprint%3D1&type=98&cHash=1c80e08b2ac6f6845815d616c9bf5e81](https://www.bertelsmann-stiftung.de/de/system/pdf?tx_rsbrowserlesspdf_pi1%5Burls%5D%5B0%5D=https%3A%2F%2Fwww.bertelsmann-stiftung.de%2Fde%2Fpublikationen%2Fpublikation%2Fdid%2Fgovernance-of-digitalization-in-europe%3Fprint%3D1&type=98&cHash=1c80e08b2ac6f6845815d616c9bf5e81); for the need for "stakeholder buy-in" regarding platform regulation, see Smith, "Enforcement and Cooperation between Member States: E-Commerce and the Future Digital Services Act," 30.

74 See p. 9 in the annex of the PDF version of the DSA draft.

Enforcing the GDPR is seriously hampered by a lack of funding at many data protection authorities across the EU.<sup>75</sup> In a survey, German data protection authorities said they did not have sufficient means to fulfill their tasks.<sup>76</sup>

Hiring an expert and diverse staff with backgrounds not only in law, but also the humanities, computer science and software development, sociology, psychology, library science<sup>77</sup>, user interface design, and consumer protection will be a hard, but vital task for a European DSC. Working at a regulatory body with a specific and strong mandate of overseeing some of the platforms that shape millions of people's everyday communications might be a good enough reason for many experts to join. Beyond a mission for public service, the DSC should also offer some of the financial perks and career opportunities that experts on platform issues would receive elsewhere, including the private sector, and that are often lacking at existing regulatory bodies.

A well-resourced oversight body is especially pertinent considering who the DSC would have to oversee. Companies like Facebook and Google are not only behemoths within tech, but in the global corporate world. These companies spent millions of euros and employ dozens of staff to lobby in the EU. Furthermore, researchers allege that through associations and other groups, tech companies also often engage in lobbying that is not reported in the Commission's Transparency Register.<sup>78</sup> Countering this type of financial and political power is hard for any regulator, especially if the regulator is not only dealing with platforms, but also has to fulfill other tasks. This is the case for many existing national regulators, including media regulators and data protection authorities across the EU, as well as the German BfJ dealing with NetzDG. The European DSC's singular focus on platform oversight could be a remedy for this. That necessitates a budget at least on par with that of big national regulators and big tech companies' lobby spending.

75 Massé, "Two Years Under the EU GDPR – An Implementation Progress Report: State of Play, Analysis, and Recommendations"; Johnny Ryan and Alan Toner, "Europe's Governments Are Failing the GDPR. Brave's 2020 Report on the Enforcement Capacity of Data Protection Authorities" (London: Brave, April 2020), <https://brave.com/wp-content/uploads/2020/04/Brave-2020-DPA-Report.pdf>.

76 German Data Protection Authorities, "Evaluation of the GDPR under Article 97: Questions to Data Protection Authorities/European Data Protection Board. Answers from the German Supervisory Authorities" (Brussels: European Data Protection Supervisor, 2020), 15, [https://edpb.europa.eu/sites/edpb/files/de\\_sas\\_gdpr\\_art\\_97questionnaire.pdf](https://edpb.europa.eu/sites/edpb/files/de_sas_gdpr_art_97questionnaire.pdf).

77 The overlaps between online platforms, especially search engines, and libraries were pointed out to me by Irene (Irene Knapp). How librarians could help with content moderation issues has been mentioned in Joan Donovan, "Shhhh...Combating the Cacophony of Content with Librarians" (Cambridge, MA: Harvard University, January 2021), <https://www.ned.org/wp-content/uploads/2021/01/Combating-Cacophony-Content-Librarians-Donovan.pdf>.

78 Max Bank, "Leak: Googles aggressive Lobbykampagne gegen neue Regeln für Big Tech | LobbyControl," October 29, 2020, <https://www.lobbycontrol.de/2020/10/leak-googles-aggressive-lobbykampagne-gegen-neue-regeln-fuer-big-tech/>; Lobbycontrol and Corporate Europe Observatory, "Big Tech Lobbying: Google, Amazon & Friends and Their Hidden Influence," *Corporate Europe Observatory*, September 23, 2020, <https://corporateeurope.org/en/2020/09/big-tech-lobbying>.





## 6. Conclusion and Outlook for National and European Debates on Enforcing the DSA

The DSA contains many new and promising due diligence rules aimed at creating transparency and accountability at big tech companies. This is a welcome move as it acknowledges the key role that such commercial platforms play in people's daily personal, social and work lives. However, the DSA obligations risk falling victim to an ambiguous enforcement mechanism relying heavily on existing national regulators and the Commission. National and EU-level policymakers have the opportunity to address this risk and improve the DSA's oversight structures. Specifically, the EU should consider establishing a dedicated agency to enforce due diligence rules for social media sites and search engines: a European DSC. This agency would complement and, in many cases, take the burden off of national regulators.

At the European level, to achieve this, policymakers would have to question the proposed division of labor between the Commission, the European Board for Digital Services and national DSCs. Since the idea of a platform agency is not new and the Commission had considered a European agency anyways<sup>79</sup>, it should be relatively easy to gather information and opinions on how to structure such an agency. More research could be done to draw lessons from regulatory fields, where enforcement responsibilities are already shared between national regulators and a European agency (in various ways), for instance, food safety, chemicals, banking or drugs. This would then aid the discussion of the pros and cons of a new European agency. Policymakers should ensure that a European DSC has clearly delineated tasks and does not replicate existing oversight structures. Ultimately, debates would surely turn towards budget, staffing and the location of a new agency, which ideally policymakers would only address after clarifying the more important matters of scope and powers for the DSC.

At the national level, policymakers and regulators would have to evaluate critically where the lines between the European DSC and national regulators should be drawn. Many member states might welcome a European DSC with a narrow focus on due diligence at social media and search engines, if it adds to their regulatory landscape and takes the burden off of already overstretched national agencies. A special responsibility regarding future iterations of the DSA falls on those member states that already have some of their own due diligence rules for platforms in place and/or have tasked national regulators with overseeing social media sites and search engines. Austria, France and Germany are prominent examples. Especially in these

<sup>79</sup> European Commission, "SWD(2020) 348 Final 1/2 – Impact Assessment Report on the Digital Services Act" (Brussels: European Commission, December 15, 2020), 46, [https://ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=72161](https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=72161).



countries, a debate is needed about what platform regulatory issues are best handled by member states and what issues are best handled at the EU level. To start such a debate, it might be useful to ask what an ideal platform oversight mechanism looks like – without regard for existing structures – and only then ask if it makes sense to incorporate such mechanisms into existing structures. If national lawmakers conclude that sticking to their regulatory paths is indeed best and that opening clauses for the DSA are necessary, they should ensure that such exemptions apply to clearly defined cases. In any event, national policymakers should refrain from engaging in petty political discussions over what agency or what political level has dips on regulating platforms.

In their quest to further develop the DSA, both national and European lawmakers could be inspired by the responses to the public consultation on the DSA. Analyzing the almost 3,000 entries and roughly 300 position papers revealed that “EU oversight is considered crucial and the majority of respondents seems to favour a unified oversight entity.”<sup>80</sup>

<sup>80</sup> European Commission, COM(2020)825/1 – Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC; Initial committee reports from the European Parliament also suggested the creation of an EU enforcement body.



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## Annex: Key Points From the DSA on Platform Oversight

Selected due diligence mandates for platforms (orange = “very large online platforms”) and the roles of the DSCs in the member states and the European Commission

Article	Due diligence for platforms	Role/powers of DSC	Role/powers of Commission
11	Legal representatives	Receive notice of names of legal representatives	
		Exchanges with legal representatives	
13	Publication of transparency report (for all intermediary services)		
14, 15	Notice and action mechanisms		
17	Internal complaint-handling system		
18	Out-of-court dispute settlement	Certification of the body for out-of-court dispute settlement	
19	Prioritized handling of notices from trusted flaggers within notice and action mechanism	Certification and potentially revocation of status as trusted flaggers; submission of list of trusted flaggers to Commission	Publication of list of trusted flaggers
23	Publication of transparency report with additional details to those in article 13 (for online platforms)	Request information from transparency report at any time	Development of implementing acts for content and form of transparency reports
24	Disclosures on online advertising		
25		Regular verification of the sizes of platforms	Methodology for determining platform sizes (via delegated act)
26	Annual risk assessments		



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Article	Due diligence for platforms	Role/powers of DSC	Role/powers of Commission
27	Implementation of risk mitigation measures		Identification and assessment of risk (together with board) based on reports by platforms
		Optional: Development of guidelines for risk mitigation	
28	Annual audit on compliance with all due diligence measures		
29	Explanations of recommender systems		
30	Development of an ad repository		
31	Granting data access	Reception and use of data	
			Development of delegated acts to specify data access
32	Compliance officer	Cooperation with compliance officer	
33	Publication of transparency report with additional details to those in article 13 (for very large online platforms)	Reception of transparency reports	



**More selected powers of the DSCs in the member states and of the Commission**

Article	DSC	Commission
38	Each member state must designate one or more competent authority/authorities responsible for the enforcement of the DSA	
	One of the competent authorities must be designated as the DSC = responsible for all matters related to enforcing the DSA (except where member state has delegated some tasks to specific authorities) = responsible for the coordination of national authorities	
41	Investigative powers: – Requesting platforms to provide information – Conducting on-site inspections of platforms – Interviewing platform employees	
	Enforcement powers: – Making the platforms' commitments binding – Ordering cessation of infringements – Imposing fines and periodic penalty payments – Issuing interim measures (including, if applicable, requesting platform management to prepare an action plan and report on it; if applicable, requesting judicial authority to temporarily restrict access to the platform)	
43	Develop of a mechanism for citizens to lodge a complaint	
44	Annual report on activities	Receive of reports from DSCs
45, 46	Participate in processes for cross-border cooperation and joint investigations between DSCs	
47–49	Participate in European Board for Digital Services	Chair European Board for Digital Services
	= Advisory body for the Commission, composed of DSCs and, where appropriate, other competent authorities of the member states – Member states have one vote each, Commission has no voting rights – Tasks: Advise Commission and DSCs; coordinate joint investigations; issue opinions and recommendations	



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Article	DSC	Commission
50	Involve the Commission when overseeing very large platforms	
51	Transmit information to the Commission  Receive communications from the Commission regarding its decisions	Issue resolutions on non-compliance with the DSA as well as fines (in certain cases, upon recommendation of the board or on its own initiative)
52	Support the Commission upon request	Demand from platforms “information relating to the suspected infringement”
53		Interview platform employees
54		Search of premises of platforms (also by designated experts)
55		Impose interim measures
56		Declare that commitments made by the platforms are binding
57		Monitor DSA compliance with “access” to platforms’ “databases and algorithms”
58		Determine non-compliance with the DSA
59, 60		Impose fines and periodic penalty payments
67		Establish an information exchange system with DSCs

Role of member states:

- Art. 39: Member states must ensure that DSCs and competent authorities perform their tasks in an “impartial, transparent and timely manner” and have “adequate technical, financial and human resources”; DSCs and competent authorities must act in “complete independence”.
- Art. 42: Member states must define “effective, proportionate and dissuasive” penalties.



## **About the Stiftung Neue Verantwortung**

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